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# APPLYING THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN CONFLICT ZONES: RELEVANCE AND RESPONSIBILITY

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## I. INTRODUCTION[1]

The occurrence of armed conflict and internal disturbances and tensions will pose considerable dangers for the enjoyment of human rights. The risk to them will come not simply from those whose resort to force and efforts to foment conflict and hostility is illegitimate — both are incompatible with the democratic society with which the European Court of Human Rights[2] has emphasised the rights in the European Convention on Human Rights[3] and its Protocols are inextricably linked[4] — but also from the steps taken by a state to resist and defeat such force and efforts — notwithstanding that this may be required by the duty to safeguard the rights and freedoms of those within its jurisdiction[5] — as it may disregard the requirements of the Convention in doing so.

Armed conflict entails the use of military forces, whether in an internal or international context, and internal disturbances and tensions are taken to be a sustained situation rather than an isolated incident (such as a riot). Neither may be so grave as to involve a threat to the life of the nation and thus justify the making of a derogation under Article 15 but in at least some circumstances this will be warranted. Both would appear to have implications for human rights in at least two discrete (even if potentially overlapping) situations, namely, in the course of the actual conflict or disturbance (ie, where force is actually being used) and in other parts of the country while such conflict or disturbance is taking place.

Action taken to deal with the conflict or disturbance in the former situation[6] may not be acceptable in the latter one and the recognition that an all-embracing approach may be inappropriate will be important when making preparations before such situations arise, particularly as regards shaping the attitude of those who will ultimately be involved in restricting rights and freedoms.

The second part of this paper considers first the general considerations relating to the Convention that should inform measures taken in response to conflict and disturbance. It then looks at the way in which the Court has dealt with their application in the context of individual rights and freedoms. It concludes with suggestions for transforming the principles identified into a recommendation or guidelines.[7] The third part of the paper examines the issue of responsibility under the Convention in conflict zones. Although this will not generally be problematic in most situations occurring in such zones, both their location and the possible involvement in situations occurring in them of not only more than one High Contracting Party to the Convention but also of non-parties and non-state actors raises the possibility of responsibility being shared, transferred and even ousted. The first and second of these possibilities reflects the complexity of the situation that may exist in a conflict zone but the third is disturbing as it means that the most significant human rights protection mechanism will no longer be available for those caught up in such a situation.

[1] The second part of this paper is a revised and updated version of the author's *Study on the Principles Governing the Application of the European Convention on Human Rights during Armed Conflict and Internal Disturbances and Tensions* (DH-DEV (2003)001, 19 September 2003).

[2] "The Court.

[3] "The Convention".

[4] See *Refah Partisi (Welfare Party) v Turkey*, 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003 [GC].

[5] *Ibid*.

[6] Hereafter referred to as to "the conflict zone".

[7] This study does not address the issue of the applicability of the Convention to conflict or disturbance outside the territory of any of the High Contracting Parties but location has been seen as an important factor in determining whether particular action falls within 'jurisdiction' for the purpose of Article 1; *Banković and Others v Belgium and Others* (dec.), 52207/99, 12 December 2001 [GC].

## II. RELEVANCE IN CONFLICT ZONES

### A. General considerations

*1. Fundamental principles applicable in any context*

In applying the Convention to these situations there are a number of fundamental principles applicable to its operation in any context that must continually be borne in mind. However, it ought to be underlined that there is no question about the applicability of the Convention to conflict zones as this is explicitly recognised in two of its provisions[8] and Protocols No. 6 and No.13.[9] The requirements of the Convention are thus not ousted by the rules of international humanitarian law.[10]

In the first place there is a need to respect the legality requirement for any restriction, meaning that it not only has a specific legal basis but that the content of the rule is both accessible and foreseeable for those to whom it applies.[11] The failure to invoke domestic law for a military operation leading to the death of civilians was thus a significant element of the finding in *Isayeva v Russia*[12] that Article 2 had been violated.

Secondly any restriction must be applied in a manner that is both non-arbitrary[13] and does not entail any difference in treatment between categories of persons for which there is no rational and objective justification.[14] Measures taken against someone solely on account of factors such as his or her race, ethnicity, language and religion are thus inadmissible but, as allegations may be hard to prove,[15] particular attention ought to be given to ensuring that any action taken during a conflict or disturbance is not actually being used as a guise to harm someone because of his or her personal characteristics or beliefs.[16]

Thirdly the imposition of all restrictions must respect the principle of proportionality and should not lead to any rights or freedoms being entirely extinguished.[17]

Finally there are certain rights and freedoms which are non-derogable whatever the context and thus cannot be subjected to any limitations.[18]

These principles need to be at the forefront of any response in the situation in conflict zones (and other parts of the country concerned) as, despite being well-established, they are often lost sight of in practice. They have particular implications for the desirability of putting in place measures to governing conflicts and disturbances before such situations arise and thereby reduce the risk of ill-conceived responses to them.

*2. Broad considerations of particular significance for conflict zones*

In addition to these principles just considered there are some additional broad considerations of particular significance for situations in conflict zones which should also be taken into account.

Firstly, depending on the nature of the situation and the response proposed, there may be a need for a formal acknowledgement of an emergency which then justifies the taking of measures in derogation from the scope of the rights and freedoms that must normally be secured.[19] This is specifically required for such action to be lawful under the Convention[20] and, where geographically limited, it cannot be invoked elsewhere.[21] However, although the Court has not

[8] Articles 4b and 15

[9] The former permitting and the latter prohibiting the use of death penalty in time of war.

[10] It should be noted that the International Court of Justice reaffirmed the applicability of international human rights law during armed conflict in both reaffirmed the applicability of international human rights law during armed conflict *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and its judgment in the *Case Concerning Armed Activities on the Territory of the Congo*. The same view was taken by the United Nations Human Rights Committee in its General Comment No. 31 on Article 2 of the International Covenant on Civil and Political Rights.

[11] *Silver v United Kingdom*, *5947*/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, 13 March 1983.

[12] *Isayeva v Russia*, 57950/00, 24 February 2005.

[13] *Witold Litwa v Poland*, 26629/95, 4 April 2000.

[14] A requirement of Article 14 of the Convention; see *Gaygusuz v Austria*, 17371/90, 16 September 1996. This provision is not considered further below.

[15] See *Ireland v United Kingdom*, 5310/71, 18 January 1978 and *Yöyler v Turkey*, 26973/95, 24 July 2003.

[16] See *Nachova and Others v Bulgaria*, 43577/98 and 43579/98, 6 July 2005 [GC], *Moldovan and Others v Romania (No 2)*, 41138/98 and 64320/0112 July 2005 and *Bekos and Koutropoulos v Greece*, 15250/02, 13 December 2005,

[17] See *Campbell and Cosans v United Kingdom*, 7511/76; 7743/76, 25 February 1982, *Hertel v Switzerland*, 25181/94, 25 August 1998 and *Heaney and McGuinness v Ireland*, 34720/97, 21 December 2000.

[18] A requirement of Article 15(2) of the Convention.

[19] It is surprising that not all situations of conflict in which High Contracting Parties to the Convention have been involved have been ones in which a derogation has been considered necessary. Although it is possible that "normal" powers may be sufficient to deal with some conflicts, the findings of violations in cases such as *Brogan v United Kingdom*, 11209/84, 11234/84, 11266/84 and 11386/85, 29 November 1988 and in respect of the situation in Chechnya suggest that such an assumption can be over-optimistic. The failure to make a derogation also limits the scope for early collective scrutiny of the action being taken. The Court has yet to address the question of whether a derogation would be possible in respect of use of force outside the territory of a High Contracting Party but an affirmative answer seems appropriate both where the action is defensive (and thus necessarily dealing with a threat to the life of the nation) or is enforcement action under Chapter 7 of the United Nations Charter (with the threat to international peace and security justifying it being seen as much a threat to the individually states called upon to act as to the members of the United Nations collectively). As to the actual applicability of the Convention to conflict zones outside the territories of High Contracting Parties, see Part III.

[20] Article 15(3).

[21] *Sakik and Others v Turkey*, 23878/94, 23879/94 and 23880/94, 26 November 1997, *Sadak v Turkey*, 25142/94 and 27099/95, 8 April 2004, *Yurttas v Turkey*, 25143/94 and 27098/95, 27 May 2004, and *Yaman v Turkey*, 32446/96, 2 November 2004.

ruled that the requirement for an official proclamation in the comparable provision of the International Covenant of Civil and Political Rights[22] has become a requirement of the Convention through the duty not to act inconsistently with other obligations under international law,[23] the need to ensure that this is effectively achieved must be seen as something essential for fulfilling the legality principle.

Secondly the duty just mentioned, together with the wider obligation not to use Convention provisions to limit or derogate from the other human rights obligations of the High Contracting Parties,[24] means that any more exacting requirements of international humanitarian law standards can inform the specific application of Convention provisions in time of conflict and disturbance.[25]

Thirdly, although individual aspects of the remedial obligation under Article 13[26] do not always need to be fulfilled through judicial procedures where security considerations are involved,[27] the availability and accessibility of judicial supervision over the need for and specific use of exceptional measures must be maintained. This will be so even where the rights and freedoms affected are derogable as this is still the only guarantee that the measures taken under a derogation are strictly required by the exigencies of the situation and do not encroach upon non-derogable rights and freedoms.[28] However, the provision of additional safeguards against abuse will be an important consideration in determining whether specific restrictions pursuant to a derogation are acceptable.[29] In addition it needs to be borne in mind that remedial measures are an important substantive element of many rights and freedoms, particularly those that are non-derogable. Furthermore there will be a particular need in times of conflict and disturbance for measures to be taken to ensure that there is no breach of the obligation to allow recourse to the European Court[30] and that, given the confusion likely to be engendered, there will be no obstacle to observing any interim measures that it might indicate[31]. Nevertheless there may be some scope for distinguishing between the fulfilment of the remedial requirements of the Convention at a time of conflict or disturbance and the period afterwards, such as regards investigation into particular behaviour, civil and criminal responsibility and the payment of compensation in respect of certain acts.

**B. Principles identifiable in the Convention and the Court's case law32**

*1. Article 2 and Protocols No. 6 and No. 13 — Right to life and abolition of the death penalty*

There is undoubtedly an enhanced risk that life will be endangered or lost in conflict zones. However, although the guarantee in Article 2 is not absolute, its non-derogable character means that such a situation cannot be used as a justification for extending the circumstances in which a deprivation becomes acceptable, even if it might set limits on the possibility of this being prevented. Thus the duty to take appropriate steps to protect life which has been recognised by the Court as a positive aspect of the guarantee afforded by this provision[33] must be taken fully into account in determining which military and law enforcement action should be taken. It must be accepted that there cannot be responsibility for loss of life where there was a justifiable lack of appreciation of the risk or where as much as possible was done with the resources available at the time but it will arise where there is a failure to take the action that was feasible to mitigate or remove the harm that was faced by others. Furthermore, while this may often be a matter of physical intervention, it also needs to be recognised that the timely provision of information about dangers that are imminent is an essential aspect of this obligation[34] and this should not necessarily be outweighed by operational considerations that are understandably important from the perspective of the military and the police. This duty to warn and protect can extend can extend to military and law enforcement

[22] Article 4.

[23] Article 15(1); see *Brannigan and McBride v United Kingdom*, 14553/89 and14554/89, 26 May 1993.

[24] Article 53.

[25] On the whole the Convention is likely to embody more extensive guarantees for individuals in conflict zones.

[26] Which is not discussed further below.

[27] See *Klass and Others v Germany*, 5029/71, 6 September 1978 and *Leander v Sweden*, 9248/81, 26 March 1987.

[28] *Lawless v Ireland (No 3)*, 332/57, 1 July 1961, *Brannigan and McBride v United Kingdom*, 14553/89 and14554/89, 26 May 1993, *Demir v Turkey*, 21380/93, 21381/93 and 21383/93, 23 September 1998 and *Elci and Others v Turkey*, 23145/93 and 25091/94, 13 November 2003.

[29] *Ibid*.

[30] Under Article 34; see *Assenov and Others v Bulgaria*, 24760/94, 28 October 1998 and *McShane v United Kingdom*, 43290/98, 28 May 2002.

[31] See *Mamatkulov and Abdurasulovic v Turkey*, 46827/99 and 46951/99, 4 February 2005 [GC].

[32] For attempts to elaborate standards at the global level, see the Declaration of Minimum Humanatiarian Standards ("the Turku Declaration") of 2 December 1990 and the attempt within the United Nations to draw up "Fundamental Standards of Humanity" (e.g. the United Nations Commission on Human Rights document, *Fundamental standards of humanity, Report of the Secretary-General*, E/CN.4/2006/87, 3 March 2006).

[33] *Osman v United Kingdom*, 23452/94, 28 October 1998 [GC], *Mahmut Kaya v Turkey*, 22535/93, 28 March 2000, *Pretty v United Kingdom*, 2346/02, 29 April 2002 and *Öneryildiz v Turkey*, 48939/99, 30 November 2004 [GC].

[34] As in *Öneryildiz v Turkey*, 48939/99, 30 November 2004 [GC].

action or defensive measures are capable of causing harm to civilians[35].

However, although Article 2 recognises the potential legitimacy of a use of force leading to loss of life where this is to defend someone, to effect an arrest or to quell a riot or insurrection, the requirement that this be 'absolutely necessary' is a very substantial constraint on the circumstances in which it can be undertaken. It is clear that this must control both the planning and the execution of an operation. In respect of the former there is a need to ensure that there is adequate evaluation of the intelligence on which action is to be based, as well as of the different options to be pursued (with full account being taken of the need to minimise risk to those who might be caught up in the operation), and that those carrying out the operation are suitably briefed about the situation and any weaknesses in the information being relied upon[36]. Furthermore it is of the utmost importance that those selected for the operation be as well trained and equipped as possible for it, with particular attention being paid to the danger of indiscriminate loss of life that might be posed through the use of particular weapons[37].

There should be no authorisation for a use of force in circumstances forbidden by international humanitarian standards — in particular the use of substantial force against areas occupied by civilians will only be exceptionally justified — or for the employment of weapons that are proscribed under international obligations applicable to the state concerned[38].

In the conduct of an operation itself the use of lethal force will only be justified where there is imminent risk of death or serious harm[39]. Furthermore the principle of necessity should often require that those against whom force can legitimately be used to be are tackled first with non-life threatening methods[40] or are first given an opportunity to surrender[41] but this could not be expected where this would itself endanger life[42]. However, it will be essential to train those authorised to use force regarding how to make a proper assessment as to whether its use in particular circumstances is justified or whether non-lethal alternatives should first be employed, as well as to appreciate the need always to observe the principle of proportionality and to seek to minimise the loss of life wherever the use of force is justified[43]. A killing after someone has been neutralised will not be justified[44].

There will always be a need to be able to account for a death occurring during a military operation[45]. Thus, wherever deaths result from a use of force there will always be a responsibility to ensure that a thorough, effective and independent investigation into them is automatically carried out and appropriate arrangements to facilitate this in the difficult circumstances of conflict and disturbance out to be established in more normal times[46]. This will also be the case with a disappearance that follows a military operation[47].

The need for an element of public scrutiny of an investigation, as well as the involvement in it of relatives, that has been identified as important by the Court may be constrained by the security context but it ought not to be entirely eliminated and further review of what occurred might be needed once the conflict or disturbance is over. In any event it will be important that steps are taken to secure evidence and identify witnesses at the earliest opportunity. Furthermore, although the confusion which surrounds such situations (as well as security concerns) may excuse some non-compliance with the promptness normally expected of such investigations, neither a complete failure to act nor a lack of professionalism will be regarded as acceptable. Moreover it will be important that any explanations given for what occurred be subjected to the strictest scrutiny and the burden should lie on those using force to provide a satisfactory and convincing explanation for having done so[48]. This obligation is equally applicable both where a person dies once he or she has been taken into custody[49] and where a person has been taken into official custody and his subsequent whereabouts

[35] See *Pasa and Erkan Erol v Turkey*, 51358/99, 12 December 2006.

[36] *McCann and Others v United Kingdom*, 18984/91, 27 September 1995 [GC].

[37] *Andronicou and Constantinou v Cyprus*, 25052/94, 9 October 1997.

[38] See *Isayeva v Russia*, 57590/00, 24 February 2005 and *Isayeva, Yusupova and Bazayeva v Russia*, 57947/00, 57948/00 and 57949/00, 24 February 2005.

[39] See *Kakoulli v Turkey*, 38595/97, 22 November 2005.

[40] See *Simsek v Turkey*, 35072/97 and 37194/97, 26 July 2005.

[41] *Ogur v Turkey*, 21594/93, 20 May 1999.

[42] See *Ahmet Ozkan v Turkey*, 21689/9, 3, 6 April 2004, *Perk v Turkey*, 50739/99, 28 March 2006 and *Yuksel Erdogan v Turkey*, 57049/00, 15 February 2007.

[43] See *Isayeva v Russia*, 57590/00, 24 February 2005 and *Isayeva, Yusupova and Bazayeva v Russia*, 57947/00, 57948/00 and 57949/00, 24 February 2005.

[44] *Kakoulli v Turkey*, 38595/97, 22 November 2005.

[45] See *Akkum v Turkey*, 21894/93, 24 March 2005.

[46] See *McCann and Others v United Kingdom*, 18984/91, 27 September 1995 [GC], *Kaya v Turkey*, 22729/93, 19 February 1998, *McShane v United Kingdom*, 43290/98, 28 May 2002, *Finucane v United Kingdom*, 29178/95, 1 July 2003, *Isayeva v Russia*, 57590/00, 24 February 2005 and *Isayeva, Yusupova and Bazayeva v Russia*, 57947/00, 57948/00 and 57949/00, 24 February 2005, *Perk v Turkey*, 50739/99, 28 March 2006, *Bazorkina v Russia*, 69481/01, 27 July 2006 and *Estamirov v Russia*, 60272/00, 12 October 2006.

[47] See *Ipek v Turkey*, 25760/94, 17 February 2004.

[48] *McKerr v United Kingdom*, 28883/95, 4 May 2001.

[49] *Jordan v United Kingdom*, 24746/94, 4 May 2001.

are unknown[50]. In some situations a criminal prosecution of those considered responsible for unjustified use of force will not be immediately practical but a failure to bring one in more settled circumstances will not generally be justified where it is warranted by the evidence. It is possible that an amnesty may be justified by the need to defuse tensions[51] but this should not affect the civil claims of relatives[52].

Extrajudicial executions can never be justified[53] and the death penalty may not be used in times of conflict by states that are parties to Protocol No. 13. However, even in states where the death penalty may still be used in time of conflict[54], the difficult nature of such a situation might preclude a person from receiving the fair trial required before such a sentence can be imposed[55] and this would be a violation of the right to life.

Although the situation in conflict zones may pose particular problems of distribution, there is still a responsibility under Article 2 to ensure that persons in the custody of the authorities do receive medical care for illnesses or injuries that are life-threatening[56].

*2. Article 3 — Prohibition of torture*

The non-derogable character of this guarantee means that the standard of treatment which it requires should not be affected by the existence of conflict or disturbance, particularly given its reinforcement by the similar requirements of the Geneva Conventions and its Protocols.

However, while this means that physical and mental ill-treatment already found to be objectionable[57] cannot become acceptable by virtue of either the imperatives and stresses to which such situations inevitably give rise or of the alleged character of those involved in them[58], particular attention will need to be given to ensuring that appropriate arrangements are in place to fulfil the obligation to carry out a thorough and effective investigation into allegations of such ill-treatment[59] since the situations in question may be surrounded by confusion and also result in delays on account of the security concerns. Although the latter may excuse the lack of promptness normally expected of such investigations, neither a complete failure to act nor a lack of professionalism will be regarded as acceptable. In particular it will be important that steps are taken to secure evidence and identify witnesses.

Moreover it will be important that any explanations given for injuries are subjected to the strictest scrutiny[60]. In some situations a criminal prosecution of those considered responsible for using proscribed forms of ill-treatment will not be immediately practical but a failure to bring one in more settled circumstances will not be justified[61]. Furthermore there should be no undue delay in providing adequate medical treatment for the injuries that may have been inflicted in breach of this guarantee[62].

The circumstances may affect the means available for transporting those taken prisoner but these must still not exceed the threshold at which treatment becomes prohibited[63]. Such circumstances may also affect the nature of the facilities available to keep persons whose detention is compatible with the Convention, but there will be a need to ensure that conditions which may be barely tolerable for a few days do not become the norm and thus result in the imposition of treatment that is degrading or inhuman[64]. Furthermore there will be a particular need to ensure that the facilities used take into account the difficulties faced by persons with serious incapacities, whether sustained in the course of the conflict or disturbance or beforehand[65]. Although the security context may justify very strict supervision of persons detained during conflict and disturbances, it is not permissible to use any form of sensory isolation and repeated use of search procedures is likely to be seen as degrading treatment[66].

[50] See *Mahmut Kaya v Turkey*, 22535/93, 28 March 2000, *Irfan Bilgin v Turkey*, 25659/94, 17 July 2001 and *Cyprus v Turkey*, 25781/94, 10 May 2001 [GC].

[51] See Appl 16734/90, *Dujardin and Others v France*, 72 DR 236 (1991).

[52] See Section A.1 on restrictions not entirely extinguishing rights and freedoms.

[53] See *Bazorkina v Russia*, 69481/01, 27 July 2006.

[54] Armenia, Azerbaijan, France, Italy, Latvia, Portugal and Spain have still to ratify Protocol No. 13

[55] See *Öcalan v Turkey*, 46221/99, 12 May 2005 [GC].

[56] *Keenan v United Kingdom*, 27229/95, 3 April 2001 and *Anguelova v Bulgaria*, 38361/97, 13 June 2002.

[57] See *Ireland v United Kingdom*, 5310/71, 18 January 1978, *Aksoy v Turkey*, 21987/93, 18 December 1996, *Aydin v Turkey*, 23178/94, 25 September 1997, [GC] *Selmouni v France*, 25803/94, 28 July 1999 [GC], *Satik and Others v Turkey*, 31866/96, 10 October 2000, *Rehbock v Slovakia*, 29462/95, 28 November 2000 and *Poltoratskiy v Ukraine*, 38812/97, 29 April 2003.

[58] *Chahal v United Kingdom*, 22414/93, 15 November 1996 [GC].

[59] See *Aydin v Turkey*, 23178/94, 25 September 1997 [GC], *Selmouni v France*, 25803/94, 28 July 1999 [GC], *Labita v Italy*, 26772/95, 6 April 2000 [GC] and *Chitayev and Chitayev v Russia*, 59334/00, 18 January 2007.

[60] *Tomasi v France*, 12850/87, 27 August 1992 and *Ribitsch v Austria*, 18896/91, 4 December 1995.

[61] See *Egmez v Cyprus*, 30873/96, 21 December 2000 and *Al-Adsani v United Kingdom*, 35763/97, 21 November 2001.

[62] See *Kudla v Poland*, 30210/96, 26 October 2000, *Keenan v United Kingdom*, 27229/95, 3 April 2001 and *McGlinchey v United Kingdom*, 50390/99, 29 April 2003.

[63] See *Öcalan v Turkey*, 46221/99, 12 May 2005 [GC] and *Ahmet Ozkan v Turkey*, 21689/93, 6 April 2004.

[64] See *Dougoz v Greece*, 40907/98, 6 March 2000, *Peers v Greece*, 28524/95, 19 April 2001 and *Kalashnikov v Russia*, 47095/99, 15 July 2002, *Poltoratskiy v Ukraine*, 38812/97, 29 April 2003 and *Ahmet Ozkan v Turkey*, 21689/93, 6 April 2004.

[65] *Price v United Kingdom*, 33394/96, 10 July 2001.

[66] See *Valasinas v Lithuania*, 44558/98, 24 July 2001 and *Van der Ven v Netherlands*, 50901/99, 4 April 2003.

A failure to show due regard for the concerns of relatives of those who have disappeared, particularly where the agents of the state concerned seem to be implicated, is likely to constitute prohibited treatment[67].

Article 3 also requires the state to take action to protect the vulnerable from abusive treatment[68] and, although the nature of the situation may define what can be expected of it at a given time, there will be no excuse for overlooking this responsibility.

There is also an obligation not to remove someone from one country to another where he or she faces a serious risk of treatment contrary to Article 3 and, although this has been most significant in the context of deportation and extradition[69], it could also be relevant to the displacement of persons in the course of hostilities.

Furthermore it is important that measures taken in time of conflict or disturbance do not have the effect of so isolating it that there is a risk of it ceasing to exist since this has been recognised as a form of degrading treatment[70].

*3. Article 4 — Prohibition of slavery and forced labour*

The prohibition of forced labour, unlike that of slavery and servitude, is derogable but a situation of conflict or disturbance might in any event justify invocation of the fact that a service 'exacted in case of an emergency or calamity threatening the life or well-being of the community' is excepted from the definition of such labour.

However, the formulation of this exception suggests that the need for this labour would only arise where a derogation under Article 15 is warranted but, even if that were not the case, there would undoubtedly have to be a clear legal basis for such exaction and any difference in the manner in which it this occurs should have a rational and objective justification; the former has not been a matter of concern for the Court but the latter has, albeit in the context of the invocation of the more usual exception regarding 'normal civic obligations'[71].

However, it should be borne in mind that the Court has indicated that servitude — which is unacceptable in any situation - could ensue from a requirement to perform a service that would otherwise be justified if this occurred in the context of a particularly serious denial of freedom[72]. It has also not rejected a submission that prolonged detention could constitute servitude[73]. There may not, therefore, be an objection to a requirement that ordinary members of the public perform tasks for the purpose of saving lives and maintaining essential services for the community, even though these might normally be performed by specialised services, but it would be unacceptable for a group to be singled out for this purpose by reference to considerations such as their ethnicity, language, nationality, race or religion. Moreover the manner in which the fulfilment of the requirement is secured should not automatically entail any additional deprivation of liberty.

The Court has so far left open the question whether the reference in Article 4 to service exacted instead of compulsory military service in countries where conscientious objectors are recognised necessarily precludes a right to conscientious objection[74]. Nevertheless the need for any form of conscription to meet the challenge posed by an armed conflict should still ensure that the determination of claims for conscientious objection (where permitted) are fairly determined and that any penalties for refusal to serve (where it is not permitted) are not disproportionate[75]; even in the absence of Protocol No. 13 being applicable, it seems improbable that execution for such a refusal, whether in the battlefield or elsewhere, would be acceptable.

*4. Article 5 — Right to liberty and security*

In the absence of a derogation under Article 15, difficult security conditions may be taken into account in the application of this provision[76] but they cannot justify detention for a ground other than one specified in Article 5(1)[77] or detention without adequate authorisation[78].

In such circumstances it is important to appreciate that restriction to a very limited area, as opposed to

[67] See *Ipek v Turkey*, 25760/94, 17 February 2004.

[68] See *Z and Others v United Kingdom*, 29392/95, 10 May 2001, *D P and J C v United Kingdom*, 38719/97, 10 October 2002 and *E and Others v United Kingdom*, 33218/96, 26 November 2002.

[69] *Soering v United Kingdom*, 14038/88, 7 July 1989 and *Ahmed v Austria*, 25964/94, 17 December 1996.

[70] *Cyprus v Turkey*, 25781/94, 10 May 2001 [GC].

[71] *Karlheinz Schmidt v Germany*, 13580/88, 8 July 1994.

[72] *Siliadin v France*, 73316/01, 26 July 2005.

[73] *Cyprus v Turkey*, 25781/94, 10 May 2001 [GC].

[74] See *Thlimmenos v Greece*, 34369/97, 6 April 2000 [GC] and *Stefanov v Bulgaria*, 32438/96, 3 May 2001. *Cf* the Commission's view in Appl 10600/83, *Johansen v Norway*, 44 DR 155 (1985) that a combined reading of Articles 4(3)(b) and 9 means that a requirement to do some alternative to military service is not precluded for those with a conscientious objection.

[75] See *Thlimmenos v Greece*, 34369/97, 6 April 2000 [GC].

[76] See *Brogan and Others v United Kingdom*, 11209/84, 11234/84, 11266/84 and 11386/85, 29 November 1988 and *Murray v United Kingdom*, 14310/88, 28 October 1994 [GC].

[77] *Lawless v Ireland (No 3)*, 332/57, 1 July 1961.

[78] *Elci and Others v Turkey*, 23145/93 and 25091/94, 13 November 2003.

confinement in a more traditional cell or prison building, could still constitute detention for the purposes of this provision if the only place to which the persons affected could otherwise go would put them at serious risk of ill-treatment or death and they are subject to strict and constant surveillance and have no access to legal or social assistance[79]. It will also be important to take effective action to prevent anyone from being illegally detained by persons other than the authorities and to ensure that there is no collusion in this regard by the latter with the former[80].

During a conflict or disturbance there may be a particular need to rely upon Article 5(1)(b) for powers to establish identity[81] or to answer questions relevant to measures being taken to deal with conflict or disturbances[82]. However, it will be especially important to ensure that these powers are not exercised, or seen to be exercised, in an arbitrary manner as tense situations may lead to misunderstandings and unnecessary resort to force. A failure to keep records may in some circumstances support a finding of arbitrariness[83]. Such a conclusion is also likely to be drawn from an inability to provide an explanation for depriving someone of his or her liberty[84].

Where persons are arrested in connection with an offence, the reasonableness of the suspicion required for this purpose can take into account the circumstances of conflict and disturbance but, although that will permit reliance on anonymous informers, there is still a need for specificity regarding the person's supposed involvement in the alleged offence[85].

Furthermore, while the reasons for the arrest need not be given immediately, the 'promptly' requirement will not be satisfied if more than a few hours elapse before this occurs[86]. In the absence of a derogation there can be no departure from normal time-lines for bringing the person concerned before a judge with authority to determine whether he or she should be released[87]. However, even where there is a derogation, it is unlikely that a delay of more than seven days before such production would be acceptable. In any event such a delay is dependent upon there being other guarantees against abuse, notably access to independent legal advice and medical treatment and a discrete right to challenge the legality of the detention[88].

Any decision concerning the release of a suspected offender must continue to be based on an assessment of the risk of flight, interference with the administration of justice, commission of further offences and the adverse impact on public order and the circumstances, although possibly yielding more compelling evidence of one or more of these grounds, cannot justify an automatic refusal to end the detention[89].

Where detention is maintained there will be a need to ensure that thereafter there is also a periodic judicial assessment of its continued justification, with a power to order release where it is not. Moreover suitable efforts must be made to prevent such detention becoming excessive but the context will be a legitimate consideration in this regard[90].

The context, where accompanied by a derogation, could afford a justification for the use of preventive detention and this might be especially so where it is not practicable to prosecute individuals — whether because of the situation or the inability to disclose evidence of their involvement in offences — or other alternative measures — such as removal from the country — are not an option[91]. However, there would still need to be substantial evidence against the persons concerned and the existence of procedures designed to keep under frequent review both the need to use such a measure and the suitability of its application to each individual detained. The latter need not be judicial in character but should be marked by independence and objectivity.

Every person subject to preventive detention must continue to enjoy a periodic right to bring judicial proceedings to challenge the legality of his or her detention, as indeed should anyone deprived of their liberty for whatever reason[92]. In addition it will be important to ensure that an adequate record — covering identi-

[79] See *Amuur v France*, 19776/92, 25 June 1996.

80 *Riera Blume and Others v Spain*, 37680/97, 14 October 1999.

81 Appl 16810/90, *Reyntjens v Belgium*, 73 DR 136 (1992).

[82] Appls 8022/77, 8025/77 & 8027/77, *McVeigh, O'Neill and Evans v United Kingdom*, 25 DR 15 (1981).

[83] *Ahmet Ozkan v Turkey*, 21689/93, 6 April 2004.

[84] *Chitayev and Chitayev v Russia*, 59334/00, 18 January 2007.

[85] *Murray v United Kingdom*, 14310/88, 28 October 1994 [GC] and *O'Hara v United Kingdom*, 37555/97, 16 October 2001.

[86] *Fox, Campbell and Hartley v United Kingdom*, 12244/86, 12245/86 and 12383/86, 30 August 1990.

[87] *Brogan and Others v United Kingdom*, 11209/84, 11234/84, 11266/84 and 11386/85, 29 November 1988. See also *Ahmet Ozkan v Turkey*, 21689/93, 6 April 2004.

[88] See *Brannigan and McBride v United Kingdom*, 14553/89 and14554/89, 26 May 1993, *Aksoy v Turkey*, 21987/93, 18 December 1996, *Sakik and Others v Turkey*, 23878/94, 23879/94; and 3880/94, 26 November 1997, *Demir v Turkey*, 21380/93, 21381/93 and 21383/93, 23 September 1998, *Marshall v United Kingdom* (dec.), 41571/98, 10 July 2001, *Nuray Sen v Turkey*, 41478/98, 17 June 2003 and *Bilen v Turkey*, 34482/97, 21 February 2006.

[89] *Caballero v United Kingdom*, 32819/96, 8 February 2000.

[90] See *Kerr v United Kingdom* (dec.), 40451/98, 7 December 1999, *Ahmet Ozkan v Turkey,* 21689/93, 6 April 2004 and *Yurttas v Turkey*, 25143/94 and 27098/95, 27 May 2004.

[91] *Lawless v Ireland (No 3)*, 332/57, 1 July 1961 and *Ireland v United Kingdom*, 5310/71, 18 January 1978.

[92] See *Sakik v Turkey*, 23878/94, 23879/94; and 3880/94, 26 November 1997 and *Bilen v Turkey*, 34482/97, 21 February 2006.

ties, dates and locations - is kept for all persons who are detained, whatever the basis, so that it is always possible for the authorities to be able to account for their whereabouts[93].

Furthermore, notwithstanding the disruption that may be caused by conflict and disturbance, there must be a capacity to mount a thorough and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since that occurred[94].

Ultimately a person deprived of his or her liberty in violation of Article 5 should have the possibility of obtaining compensation, although it is conceivable that this could be deferred by the nature of the conflict[95].

*5. Article 6 — Right to a fair trial*

The ordinary system of criminal justice will probably be subjected to considerable strains during situations of conflict and disturbance, and especially in the conflict zone itself. However, there is no doubt that, given the importance of the safeguard role for courts in such situations that has already been discussed[96], there is no scope for compromise in the need to provide a fair procedure.

Thus, while there may be no objection to the use of special courts, their independence and impartiality must still be secured[97] and this requirement will inevitably not be fulfilled where military courts are used to try civilians[98]. Nevertheless doubts about the illegality of the occupation of another country will not necessarily entail a conclusion that the courts which are allowed to operate there do not satisfy such a requirement[99].

It will be essential, notwithstanding the security context, that access to independent legal advice is available at a very early stage of detention, particularly if this is accompanied by interrogation which could lead to a prosecution and the person is otherwise kept incommunicado[100]. However, there would be no objection to the requirement of security clearance for the lawyers providing such advice and any subsequent representation but their independence is not compromised and this would rule out the use of lawyers from the armed forces[101].

The use of any penalty for refusal to provide information in circumstances which would inevitably entail admission of involvement in a criminal offence will be a breach of the prohibition on self-incrimination where that information is actually used in a prosecution for that offence[102]. Moreover, while inferences may be drawn from a lack of co-operation in respect of matters that clearly require an explanation of a defendant's part in them[103], it is essential that the terms in which this occurs gives full credit for his or her refusal to answer questions[104]. The security context may prevent essential witnesses for the defence attending and in such cases the continuation of the proceedings in their absence could lead to a conviction that will be regarded as unfair[105]. This context might also lead to a reluctance to disclose evidence or allow the identity of witnesses to be known by a defendant but, although both may be permitted where this does not affect the overall fairness of the proceedings, this is unlikely where such evidence or such witnesses are the essential basis for securing a person's conviction[106]. It is unlikely that such reliance could be justified even in an emergency as the less draconian alternative of preventive detention would undoubtedly be available[107].

However, evidence obtained in breach of the right to respect for private life under Article 8 may still be used in a prosecution so long as this would not make the trial unfair. The latter is likely to be so where there are doubts about the voluntariness of any admission[108] or there are reasons to doubt the authenticity of the evidence concerned[109]. Moreover it is unlikely that security considerations would justify a failure to hold a trial in public, particularly as measures can be taken to prevent the identity of witnesses becoming known to the public[110]. This would not preclude security checks on the public seeking to attend a hearing and there

[93] *Kurt v Turkey*, 24276/94, 25 May 1998, *Cyprus v Turkey*, 25781/94, 10 May 2001 [GC], *Ipek v Turkey*, 25760/94, 17 February 2004 and *Chitayev and Chitayev v Russia*, 59334/00, 18 January 2007.

[94] *Ibid*.

[95] *Chitayev and Chitayev v Russia*, 59334/00, 18 January 2007.

[96] See Section A.2.

[97] *Incal v Turkey*, 22678/93, 9 June 1998 [GC] and *Sadak and Others v Turkey*, 29900/96, 29901/96, 29902/96 and 29903/96, 17 July 2001.

[98] *Cyprus v Turkey*, 25781/94, 10 May 2001 [GC].

[99] *Ibid*.

[100] See *John Murray v United Kingdom*, 18731/91, 8 February 1996 [GC], *Magee v United Kingdom*, 28135/95, 6 June 2000 and *Brennan v United Kingdom*, 39846/98, 16 October 2001.

[101] *Chahal v United Kingdom*, 22414/93, 15 November 1996 [GC].

[102] *Heaney and McGuinness v Ireland*, 34720/97, 21 December 2000.

[103] *John Murray v United Kingdom*, 18731/91, 8 February 1996 [GC].

[104] *Condron v United Kingdom*, 35718/97, 2 May 2000.

[105] *Cf* the inability to examine witnesses leading to a violation of Article 6(1) in *A M v Italy*, 37019/97, 14 December 1999 and *Luca v Italy*, 33354/96, 27 February 2001.

[106] See *Doorson v Netherlands*, 20524/92, 26 March 1996, *Van Mechelen v Netherlands*, 21363/93, 21364/93 and 21427/93, 23 April 1997, *Rowe and Davis v United Kingdom*, 28901/95, 16 February 2000 [GC], *P G and J H v United Kingdom*, 44787/98, 25 September 2001 and *Hulki Günes v Turkey*, 28490/95, 19 June 2003.

[107] See the discussion of Article 5.

[108] *Allan v United Kingdom*, 48539/99, 5 November 2002.

[109] *Khan v United Kingdom*, 35394/97, 12 May 2000.

[110] *Doorson v Netherlands*, 20524/92, 26 March 1996 and *Van Mechelen v Netherlands*, 21363/93, 23 April 1997.

would probably be no objection to the trial taking place in a secure environment such as a prison so long as public access to it was genuinely practicable.[111]

The difficulty in bringing someone to trial because of conflict and disturbance would be a legitimate consideration in assessing the reasonableness of the length of any pre-trial detention but there would still be a need to demonstrate that continued efforts were being made to hold the proceedings. This would be equally true of any delays affecting the holding of civil proceedings[112]. However, in such proceedings the use of a military judge may not present the same threat to independence and impartiality as in criminal ones[113].

As has already been noted[114], the adoption of an amnesty as a means of defusing tension in situations of conflict and disturbance may not be objectionable[115] but the abolition of civil claims for this or other reasons (such as cost and the burden on the courts) will be seen as an unjustified denial of the right of access to court[116].

*6. Article 7 — No punishment without law*

Situations of conflict and disturbance are ones in which particular attention needs to be given to ensuring that the prohibition on the creation of retrospective offences is respected, not least because the accompanying sense of urgency may lead to a failure to give the same level of scrutiny as legislation in more normal circumstances to measures specially adopted with respect to them.

Although the Court has recognised that absolute precision in the formulation of laws is not possible[117], it still requires that the scope of the conduct being regulated be sufficiently precise to enable a person to determine how he or she should behave. It generally recognises that this foresight is something that can be obtained with the assistance of a lawyer but, as this cannot be assumed to be readily available in the situations under consideration, especial attention to achieving clarity without such assistance is likely to be required.

It is equally important that the temptation to increase penalties retrospectively — whether through new measures or the expansive interpretation of existing ones[118] — be resisted, notwithstanding the potential deterrent effect on future misconduct. However, the qualification to the prohibition in Article 7(2) prevents it from becoming an obstacle to the adoption of measures that give effect to obligations under international law to characterise and punish certain conduct as crimes[119], of which those arising under international humanitarian law are of especial significance for times of conflict and disturbance.

*7. Article 8 — Right to respect for private and family life*

The circumstances in a conflict zone will undoubtedly make the need for surveillance and interception of communications all the more pressing. Although this may allow for a framework for authorisation that is not dependent upon a prior judicial ruling, the need for such a framework to be governed by objective criteria and to be still subject to an alternative form of supervision designed to forestall abuse will remain essential[120].

However, this will not mean that the information thereby obtained can then be used or disclosed for unrelated purposes[121]. Moreover investigations into intimate aspects of a person's life cannot automatically be justified by the invocation of security concerns; there will be a need for particularly weighty and convincing reasons established before this could be regarded as acceptable[122].

There is, however, no interference with private life entailed by a requirement to carry and show to the police or armed forces an identity card so long as this does not contain any private information[123] and such a requirement is likely to be essential in the course of a conflict or disturbance.

In such a context there are likely to be difficulties in resolving disputes with regard to the custody of children and there will be a need to ensure that every effort possible is taken to ensure that the interests of children and parents are not prejudiced either by pre-

[111] *Cf Riepan v Austria*, 35115/97, 15 June 2000.

[112] *Cf Agga v Greece (no. 1)*, 37439/97, 25 January 2000 which concerned a failure to take measures to deal with the effects of a strike by lawyers.

[113] *Yavuz v Turkey* (dec.), 29870/96, 25 May 2000.

[114] See the discussion of Article 2.

[115] See Appl 16734/90, *Dujardin and Others v France*, 72 DR 236 (1991).

[116] *Stran Greek Refineries and Stratis Andreadis v Greece*, 13427/87, 9 December 1994 and *Al-Adsani v United Kingdom*, 35763/97, 21 November 2001.

[117] *Cantoni v France*, 17862/91, 15 November 1996.

[118] As in *Welch v United Kingdom*, 17440/90, 9 February 1995 and *Baskaya and Okçuoglu v Turkey*, 23536/94 and 24408/94, 8 July 1999 [GC] respectively.

[119] The basis for the ruling of two applications inadmissible in *Kolk and Kislyiy v Estonia* (dec.), 23052/04 and 24018/04, 17 January 2006. The point was raised but not relied upon in *Streletz, Kessler and Krenz v Germany*, 34044/96, 35532/97 and 44801/98, 23 March 2001 [GC]. See also *K-H W v Germany*, 37201/97, 22 March 2001 [GC].

[120] *Klass and Others v Germany*, 5029/71, 6 September 1978 and *Leander v Sweden*, 9248/81, 26 March 1987.

[121] *Peck v United Kingdom*, 44647/98, 28 January 2003.

[122] *Lustig-Prean and Beckett v United Kingdom,* 44647/98, 27 September 1999 and *Smith and Grady v United Kingdom*, 33985/96 and 33986/96, 27 September 1999.

[123] Appl 16810/90, *Reyntjens v Belgium*, 73 DR 136 (1992).

cipitous action or undue delay[124]. Moreover, although dislocation and restrictions on movement during conflict and disturbance will inevitably have an adverse effect on the unity of families, there will be a responsibility both to remove barriers to reunification and to take appropriate measures to facilitate its occurrence[125].

Furthermore, while a cogent need for any use of force that entails the destruction of homes will have to be demonstrated[126], the requisitioning of property in order to house the homeless could be justified[127] and may even be required[128]. However, even though restrictions on a person's access to his or her home may be a legitimate consequence of police and military operations[129], their continued effect will need to be kept under review and they should be terminated as soon as they cease to be necessary[130].

*8. Article 9 — Freedom of thought, conscience and religion*

The Court has recognised on a number of occasions that the manifestation of religion can legitimately be restricted for reasons of public health, public safety and public order.

Such considerations could undoubtedly be invoked where the wearing of religious symbols, even without any other provocative behaviour on the part of the person concerned, or the holding of a religious service in a particular location or at a particular moment might inflame a particularly tense situation. Nevertheless the well-founded of concern about such a risk would need to be demonstrated[131].

However, such restrictions, as well as the imposition of a curfew for other reasons unconnected with the manifestation of a particular religion[132], ought not to be unnecessarily prolonged and should certainly not be applied in a way that makes compliance with religious observances entirely impossible[133].

This would be equally true of the effect of operational requirements on such observance by law enforcement officers and members of the armed forces.[134]

*9. Article 10 — Freedom of expression*

In tense situations there may be concern about the discussion of sensitive topics but the Court will only accept that this can be prevented, in the absence of any direct incitement to violence or hostility between persons, where there is significant evidence of a serious threat to disorder[135]. Such incitement could, however, be a justifiable basis for penalising past statements and for preventing their subsequent circulation, especially where particularly virulent language, hate speech and the glorification of violence has been employed[136]. Nevertheless, there is a need to ensure that strongly-worded criticism is not confused with incitement[137], action taken is clearly reasoned[138], penalties imposed are not disproportionate or severe[139] and restrictions on repetition are not overbroad or unduly continued[140].

During conflicts and disturbances media outlets and their employees are particularly likely to become the object of violence and harassment from those hostile to their reports and comments. In such circumstances the state has a responsibility to take adequate protective and investigative measures and cannot simply ignore what is happening[141]. Defence and security concerns could justify restrictions and prohibitions on the dissemination of information but only so long as these measures are genuinely effective[142].

Furthermore, while the need to prevent unjustified leaks of such information could be an exceptional basis for requiring a journalist to disclose the source from which it was obtained[143], there would have to be an extremely urgent situation before a search of

[124] *P, C and S v United Kingdom*, 56547/00, 16 July 2002.
[125] *Cyprus v Turkey*, 25781/94, 10 May 2001, [GC].
[126] *Yöyler v Turkey*, 26973/95, 24 July 2003.
[127] See the discussion of Protocol No. 1, Article 1.
[128] See *Noack and Others v Germany* (dec.), 46346/99, 25 May 2000.
[129] See *Slivenko v Latvia*, 48321/99, 9 October 2003 [GC]
[130] *Cyprus v Turkey*, 25781/94, 10 May 2001 [GC].
[131] See *Leyla Sahin v Turkey*, 44774/98, 10 November 2005 [GC], *Hasan and Chaush v Bulgaria*, 30985/96, 26 October 2000 [GC], *Serif v Greece*, 38178/97, 14 December 1999 *Metropolitan Church of Bessarabia and Others v Moldova*, 45701/99, 13 December 2001 and *Agga v Greece (no.2)*, 50776/99 and 52912/99, 17 October 2002.
[132] See the discussion of Protocol No. 4, Article 2.
[133] See *Cha'are Shalom ve Tsedek v France*, 27417/95, 27 June 2000 [GC] and *Cyprus v Turkey*, 25781/94, 10 May 2001 [GC].
[134] See *Kalaç v Turkey*, 20704/92, 1 July 1997.
[135] *Piermont v France*, 15773/89 and 15774/89, 27 April 1995 and *Cyprus v Turkey*, 25781/94, 10 May 2001 [GC].
[136] See *Jersild v Denmark*, 15890/89, 23 September 1994 [GC], *Zana v Turkey*, 18954/91, 25 November 1997 [GC], *Surek v Turkey (Nos 1 and 3)*, 26682/95 and 24735/94, 8 July 1999 [GC] and *Falakaoglu and Saygili v Turkey*, 22147/02 and 24972/03, 23 January 2007. It might even include bars on interviews with the person concerned; *Hogefeld v Germany* (dec.), 35402/97, 20 January 2000.
[137] *Incal v Turkey*, 22678/93, 9 June 1998 [GC] and *Ibrahim Aksoy v Turkey*, 28635/95, 30171/96 and 34535/97, 10 October 2000.
[138] *Cetin and Others v Turkey*, 40153/98 and 40160/98, 13 February 2003 and *Kommersant Moldovy v Moldova*, 41827/02, 9 January 2007.
[139] *Ceylan v Turkey*, 23556/94, 8 July 1999 [GC] and *Polat v Turkey*, 23500/94, 8 July 1999 [GC].
[140] *Cyprus v Turkey*, 25781/94, 10 May 2001 [GC] and *Cetin and Others v Turkey*, 40153/98 and 40160/98, 13 February 2003.
[141] *Özgur Gündem v Turkey*, 23144/93, 16 March 2000.
[142] *Observer and Guardian v United Kingdom*, 13585/88, 26 November 1991.
[143] *Goodwin v United Kingdom*, 17488/90, 27 March 1996 [GC].

his or her home or office could be regarded as warranted[144].

*10. Article 11 — Freedom of assembly and association*

Although the Court has recognised that unpopular demonstrators need to be protected against those determined to disrupt their peaceful assembly[145], the context of conflict or disturbance may mean that this is either practically impossible or would entail an excessive burden for the authorities, particularly if it was at the expense of efforts to protect life or would seriously endanger the lives of law enforcement officers. The conclusion that there is a risk of either of these occurring should not, however, be too readily reached [146] and such a conclusion should be reasoned[147]. However, where such a conclusion is justifiably reached the unpopular demonstration could be required to take place in a less problematic location or, if this is not possible, might be brought to an end[148] or prohibited from being started[149]. It would also be legitimate to prevent a demonstration from impeding the distribution of food and the performance of either essential services or of military and policing operations[150]. There can be no objection to the due imposition of criminal sanctions on those whose speech or conduct at an assembly deliberately and substantially contributed to serious disorder[151].

Furthermore, while regulation rather than prohibition may be the normal means of balancing freedom of assembly against the objectives set out in Article 11(2), a more general suspension of its exercise could be warranted where the risk of serious disorder flowing from any (rather a particular) assembly or gathering is well-founded[152], as well as where the safety of those taking part would be endangered[153]. However, the evidence of such a risk should be cogent and the suspension ought to last no longer than this continues to be the case.

The support by an association for recourse to violence — apart from the use of force consistent with the United Nations Charter — and other anti-democratic action would be a justifiable basis for its dissolution[154] but, as this is a measure that requires a prior judicial ruling on the well-founded nature of the allegation[155], a less final suspension of its activities could be regarded as acceptable during the course of a conflict or disturbance. However, this should not be used to lessen the evidential burden that should be met before taking such action[156].

Moreover, although activity which impedes the maintenance of essential services is outwith the protection of Article 11 at any time, the pursuit of such activity by a trade union would need to be extremely disruptive before its suspension could be regarded as justified. It is unlikely that the nature of a person's post would normally be sufficient to preclude him or her from belonging to a trade union in time of conflict or disturbance[157] but a bar on involvement in activities that conflict with his or her responsibilities could be justified[158]. The circumstances might also warrant some delay in reaching a conclusion as to the legitimacy of the objectives of an association for which registration is being sought but there is still unlikely to be any justification for an outright refusal that is not well-founded[159]

*11. Article 12 — Right to marry*

The existence of conflict or disturbance may impede the operation of procedures governing divorce and re-marriage. This is in itself unlikely to engage a state's responsibility under Article 12 but significant delays could have an adverse effect on the status of children born in the meantime and it would be appropriate for arrangements to be made to regularise such status after the cessation of the conflict or disturbance[160].

[144] *Roemen and Schmit v Luxembourg*, 51772/99, 25 February 2003.

[145] *Plattform "Ärtze Für Das Leben" v Austria*, 10126/82, 21 June 1980 and *Ollinger v Austria*, 76900/01, 29 June 2006.

[146] As it was in *Stankov and the United Macedonian Organisation "Ilinden" v Bulgaria*, 29221/95 and 29225/95, 2 October 2001 and *Guneri v Turkey*, 42853/98, 43609/98 and 44291/98, 12 July 2005.

[147] See *Guneri v Turkey*, 42853/98, 43609/98 and 44291/98, 12 July 2005.

[148] As in *Cissé v France*, 51346/99, 9 April 2002.

[149] Appl 8191/78, *Rassemblement Jurassien and Unité Jurassienne v Switzerland*, 17 DR 93 (1979).

[150] *Cf Gustafsson v Sweden*, 15573/89, 25 April 1996 [GC].

[151] See *Osmani and Others v The Former Yugoslav Republic of Macedonia* (dec.), 50841/99, 11 October 2001.

[152] Appl 8440/78, *Christians against Racism and Fascism v United Kingdom*, 21 DR 138 (1980).

[153] As in *Cissé v France*, 51346/99, 9 April 2002.

[154] *Refah Partisi (Welfare Party) and Others v Turkey, 41340/98, 41342/98, 41343/98 and 41344/98*, 13 February 2003. [GC]

[155] Action taken against an association can be preventative so actual implementation of anti-democratic objectives is not required; *Refah Partisi (Welfare Party) and Others v Turkey*, 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003 [GC].

[156] Reliance on supposition rather than fact led to violations of Article 11 in cases such as *United Communist Party and Others v Turkey*, 19392/92, 30 January 1998 [GC] and *The Socialist Party and Others v Turkey*, 21237/93, 25 May 1998 [GC].

[157] *Cf* Appl 11603/85, *Council of Civil Service Unions and Others v United Kingdom*, 50 DR 228 (1987).

[158] See *Rekvényi v Hungary*, 25390/94, 20 May 1999 [GC] with regard to political activities.

[159] *Sidiropoulos and Others v Greece*, 26695/95, 10 July 1998.

[160] See the Court's concern in *F v Switzerland*, 11329/85, 18 December 1987 about the effect of unreasonable restrictions on remarriage. Such action may also be needed to secure inheritance rights that could be protected under Article 8.

*12. Protocol No. 1, Article 1 — Protection of property*

The temporary requisitioning of private property for the purpose of dealing with conflict or disturbance[161] — which could result in a breach of contractual obligations owed to others - would undoubtedly be a control over its use in the general interest and the need for compensation might only arise if this was lengthy or resulted in damage[162].

Similarly case law dealing with legislative and administrative delays in the recovery of rented accommodation in order to avert a housing crisis could be used to support the use of property to meet temporary needs arising out of a conflict or disturbance, such as the provision of shelter for displaced persons through the occupation of empty properties or the billeting of such persons in occupied ones. However, there would be a need to demonstrate that genuine efforts were being made to provide alternatives as soon as practical and that this did not prejudice the needs of the families affected. Furthermore, where the provision of alternative housing is not practical once the immediate emergency had passed, there would undoubtedly be a need to ensure that the owners of the properties concerned were compensated for their losses so that they did not bear an undue burden and there should be arrangements in place so that the owners can have access to the properties to recover personal effects[163].

In dealing with conflict or disturbance there could well be circumstances in which access to particular areas would have to be controlled or prohibited, resulting in a denial of access to properties within them. This would not be objectionable in principle but the continuing need for any such exclusion would have to be demonstrated and, even if this were shown, limited access to collect personal effects ought to be allowed where feasible[164].

Some destruction of property is perhaps inevitable in the situations under consideration, being necessary for certain types of military and policing operations but also being (together with looting) something that either accompanies or characterises disturbances. The former would undoubtedly be justified so long as there was a genuine need for the action taken and compensation was subsequently paid[165]. However, in the case of the latter it is important that the authorities do not tolerate, encourage or even acquiesce in the damage, destruction and theft as otherwise they would have to accept responsibility for the losses ensuing[166].

Although the temporary seizure of property used, or suspected of being used, to assist the fomenting of disturbance or belonging to those on the opposing side of a conflict would be justified[167], permanent deprivation would not justified in the absence of it being established in at a criminal trial that such property was linked to the commission of an offence[168] unless it was something the possession of which was specifically prohibited[169].

*13. Protocol No. 1, Article 2 — Right to education*

Although the Court has accepted that delay in the provision of schooling could raise an issue of compliance with the requirements of Article 2, it has also found that this could be justified by the personal situation of the child affected[170]. Such a view was reached in the context of a personal trauma but a similar excuse for delays in provision might also be recognised where this is the consequence of the disruption that inevitably ensues where there is conflict or disturbance. This is likely to be especially true of situations where attendance at school could put children at risk of harm so that priority has to be accorded to fulfilling the positive obligation arising under Article 2 of the Convention[171].

However, in the absence of immediate risk, any indulgence regarding delay in provision would most probably be short-lived and alternative arrangements would need to be made as soon as possible[172]. Moreover where there has been an extensive period of

[161] As well as fulfilling international embargoes and other obligations; see *Islamic Republic of Iran Shipping Line v Turkey* (dec.), 40998/98, 10 April 2003.

[162] See *Stran Greek Refineries and Stratis Andreadis v Greece*, 13427/87, 9 December 1994, para 72.

[163] See *Gillow v United Kingdom*, 9063/80, 24 November 1986, *Spadea and Scalabrino v Italy*, 12868/87, 28 September 1995, *Immobiliare Saffi v Italy*, 22774/93, 28 July 1999 [GC] and *Edoardo Palumbo v Italy*, 15919/89, 30 November 2000.

[164] See *Loizidou v Turkey*, 15318/89, 18 December 1996 [GC] and *Cyprus v Turkey*, 25781/94, 10 May 2001 [GC].

[165] The former was not established in cases such as *Akdivar and Others v Turkey*, 21893/93, 16 September 1996 [GC], *Selçuk and Asker v Turkey*, 23184/94 and 23185/94, 24 April 1998, *Bilgin v Turkey*, 23819/94, 16 November 2000, *Yöyler v Turkey*, 26973/95, 24 July 2003 and *Isayeva, Yusupova and Bazayeva v Russia*, 57947/00, 57948/00 and 57949/00, 24 February 2005.

[166] See *Raimondo v Italy*, 12954/87, 22 February 1994 and *Cyprus v Turkey*, 25781/94, 10 May 2001 [GC].

[167] As in *Raimondo v Italy.*

[168] *Phillips v United Kingdom*, 41087/98, 5 July 2001.

[169] As in *AGOSI v United Kingdom*, 9118/80, 24 October 1986.

[170] *Scozzari and Giunta v Italy*, 39221/98 and 41963/98, 13 July 2000 [GC].

[171] See above.

[172] See the finding of a violation of Protocol No. 1, Article 2 in *Cyprus v Turkey*, 25781/94, 10 May 2001 [GC]where there was no effort to provide secondary education in keeping with the linguistic tradition of the enclaved Greek Cypriots in northern Cyprus when control over education was assumed by the 'TRNC' authorities.

disruption, the duty to provide schooling would probably entail appropriate efforts to make up for the education that was missed.

Although a state may wish to dissipate tension between different groups through educational programmes — and the making of such efforts are an element of the obligations with regard to education under Article 13 of the International Covenant on Economic, Social and Cultural Rights and Article 7 of the International Convention on the Elimination of All Forms of Racial Discrimination — it will be essential to ensure that this does not actually seek to indoctrinate children contrary to the religious and philosophical convictions of their parents[173].

*14. Protocol No. 1, Article 3 — Right to free elections*

A background of disputes between particular groups - distinguished by characteristics such as their ethnic or national origin, language or religion — has been recognised by the Court as justifying the adoption of a representative structure for the legislature in which at least some elements of its membership are chosen from and by members of those groups[174]. This might, therefore, be seen as an appropriate means of seeking to defuse tensions that have led to conflict or disturbances.

However, active involvement in anti-democratic activity has been accepted as a basis for barring particular members of the legislature from continuing to hold such office or engaging in other political activity[175]. Such a measure could thus be adopted with regard to any members of the legislature, as well as those seeking election to it, who have incited persons to violence or have given support for the use of armed force against their country in circumstances where this would be contrary to the requirements of the United Nations Charter.

However, not only should the imposition of such a bar be based only upon the actual conduct of those affected[176] but it should be for a limited duration[177]. Such a sanction should ought to have definitive effect only where the conduct on which it is based has been established pursuant to a judicial procedure but it is unlikely that a suspension from the legislature until this takes place would be objectionable, especially if the conflict or disturbance actually impedes the holding of a hearing. A conflict or disturbance could afford a justification for delaying an election, particularly where the circumstances would prevent the opinion of the electorate being freely expressed.

*15. Protocol No. 4, Article 1 — Prohibition of imprisonment for debt*

There is no relevant case law concerning this provision but there seems to be no reason why the circumstances of conflict or disturbance should affect compliance with the right which it guarantees.

*16. Protocol No. 4, Article 2 — Freedom of movement*

The scope for interference with freedom of movement and choice of residence envisaged in Article 2(3) would undoubtedly embrace situations of armed conflict and internal disturbances.

Case law has so far been concerned with restrictions applied to particular individuals as regards the ability to leave their residence[178], to register a change of residence[179], to enter particular areas[180] and to travel abroad[181]. Such restrictions were considered to be justified were there was a well-founded apprehension as to future conduct or a demonstrable need for the person to remain in the country. However, they were found to violate Article 2 where they had no legal basis and were continued longer than necessary. They also ought to be reasoned[182]. Moreover it was crucial to their acceptability that their scope was not disproportionate, especially as regards the impact that they had on the ability of the persons concerned to live and work.[183]

Undoubtedly more generalised restrictions such as curfews and prohibitions on entering certain zones or travelling abroad could be justified by genuine concerns about the conflict and disturbance being exacerbated and the well-being of those affected. Never-

[173] See *Kjeldsen, Busk Madsen and Pedersen v Denmark*, 5095/71, 5920/72 and 5926/72, 7 December 1976 and *Efstratiou v Greece*, 24095/94, 18 December 1996.

[174] *Mathieu-Mohin and Clerfayt v Belgium*, 9267/81, 2 March 1987.

[175] *Refah Partisi (Welfare Party) and Others v Turkey*, 41340/98, 41342/98, 41343/98 and 41344/98,13 February 2003 [GC]; having dealt with the case under Article 11, the Court did not consider it necessary to rule on the complaint regarding Protocol No. 1, Article 3.

[176] See the finding of a violation of Protocol No. 1, Article 3 in *Selim Sadak and Others v Turkey*, 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95, 11 June 2002 where the dissolution of a party was not based on the conduct of those who thereby lost their parliamentary mandate.

[177] No objection was taken to a period of five years in the *Refah Partisi* case but the precise term must be related to the extent of the impugned conduct.

[178] *Raimondo v Italy*, 12954/87, 22 February 1994, *Denizci and Others v Cyprus*, 25316-25321/94 and 27207/95, 23 May 2001, *Bottaro v Italy*, 56298/00, 17 July 2003 and *Luordo v Italy*, 32190/96, 17 July 2003.

[179] *Bolat v Russia*, 14139/03, 5 October 2006.

[180] *Landvreugd v Netherlands*, 37331/97, 4 June 2002, *Olivieira v Netherlands*, 33129/96, 4 June 2002 and *Guneri v Turkey*, 42853/98, 43609/98 and 44291/98, 12 July 2005.

[181] *Baumann v France*, 33592/96, 22 May 2001.

[182] *Guneri v Turkey*, 42853/98, 43609/98 and 44291/98, 12 July 2005.

[183] The ability to collect social security and mail was particularly significant in *Landvreugd*.

theless there would have to be evidence of the need for specific restrictions and these should not prevent access to the essentials of life or unduly impede family reunification. Close monitoring of the impact of such restrictions would thus be essential.

*17. Protocol No. 4, Article 3 — Prohibition of expulsion of nationals*

The absence of a specific limitation clause on the prohibition of expulsion or entry of nationals is unlikely to be an obstacle to the conclusion that this guarantee, even without invoking its derogable character, is not absolute. However, while it is difficult to envisage circumstances in which expulsion could be justified by reference to conflict or disturbances (especially because it could be attended by the risk of violating Articles 2 and 3 of the Convention), the considerations referred to in the preceding paragraph might, subject to similar conditions, be invoked to support a delay on admission.

*18. Protocol No. 4, Article 4 and Protocol No. 7, Article 1 — Prohibition of collective expulsion of aliens and Procedural safeguards relating to expulsion of aliens*

The conclusion that collective expulsion has occurred can only be avoided where it is evident that decisions have been based on a reasonable and objective examination of the particular circumstances of each case.

In emphasising the importance of this, the Court has been prepared to draw an adverse inference from the political context, the use of formulaic reasoning and the absence of independent legal advice[184]. Hostility to aliens may result from a conflict or be the reason for disturbances but it is unlikely that this would ever be sufficient to justify the taking of such a collective measure against them since concerns regarding public order and national security could be satisfied by other, less draconian measures, including restrictions on movement within the country.

Although concerns about public order and national security can be invoked to defer the operation of the procedural guarantee in Protocol No. 7, Article 1 until after expulsion, there is no basis for concluding that this could affect the need for individual circumstances still to be considered when taking the initial decision, even though this may be in the context of conflict or disturbance. There must, in any event, be a legal basis for the expulsion[185].

[184] *Conka v Belgium*, 51564/99, 5 February 2002.

[185] *Bolat v Russia*, 14139/03, 5 October 2006.

*19. Protocol No. 7, Article 2 — Right of appeal in criminal matters*

The nature of some offences committed during conflict and disturbances may mean that persons accused of them are tried at first instance by the highest tribunal. In such cases there is no obligation to provide an appeal but otherwise there seems to be no reason why the circumstances should affect compliance with the right which this provision guarantees. Indeed reliance on it would be particularly important if they have led to persons being tried *in absentia*[186].

*20. Protocol No. 7, Articles 3, 4 and 5 — Compensation for wrongful conviction, Right not to be tried or punished twice and Equality between spouses*

There is no relevant case law concerning these provisions but there seems to be no reason why the circumstances of conflict or disturbance should affect compliance with the right which they guarantee.

**C. Conclusion**

Although the case law of the Court that is directly concerned with the enjoyment of human rights in times of conflict and disturbance is not numerically large, it is more than sufficient to demonstrate the essential standards and practices to be followed in such difficult circumstances. The following points derived from it will be of particular significance in devising the approach to be pursued when dealing with such situations:

a. the need for human rights to be both the objective of any action taken and the basis on which it is carried out;
b. the need for there to be a clear legal basis for action taken and for this to be established as much as possible before any situation of conflict or disturbance arises;
c. the need for any action taken to respect the principles of non-arbitrariness, non-discrimination and proportionality;
d. the need to observe the non-derogability of certain rights and freedoms and to ensure not only that the conditions for any derogation in respect of others is admissible — with no right or freedom being completely extinguished - but is also adequately publicised;
e. the need for appropriate training of all who may have responsibilities affecting human rights in time of conflict and disturbance;

[186] See *Krombach v France*, 29731/96, 13 February 2001 and *Papon v France*, 54210/00, 25 July 2002.

f. the need to ensure that judicial supervision of any action by an independent and impartial court is always available and that other appropriate remedies to reduce the risk of abuse are established, with particular attention being given to effecting thorough and effective investigations of possible violations of non-derogable rights and securing the accountability of those responsible;
g. the need to take appropriate action to avoid loss of life both as regards any use of force and the risk to those not taking part in any conflict or disturbance;
h. the need to ensure that the prohibition on torture and inhuman and degrading treatment is respected both in the course of action dealing with conflict or disturbance and in any detention facilities used;
i. the need to ensure that the duty to protect the vulnerable against abuse is not overlooked;
j. the need to ensure that compulsion to assist in dealing with the consequences of conflict or disturbance doers not amount to servitude;
k. the need to ensure that the limited grounds for detention are respected, that preventive detention in an emergency is well-founded and not unduly prolonged, that adequate records are kept of all who are detained and that all such persons have access to independent legal advice;
l. the need to ensure the fairness of all judicial proceedings and to take efforts both to avoid delay and to eliminate the prejudicial consequences of any that cannot be avoided;
m. the need to have an objective basis for any surveillance and interception of communications and to ensure that information obtained is not used or disclosed for unrelated purposes;
n. the need to ensure that housing is not unnecessarily destroyed and that appropriate action is taken to re-house those who may be affected where this is necessary;
o. the need to ensure that religious observances can be carried out with the minimum of disruption;
p. the need to ensure that strongly-worded criticism is not confused with incitement;
q. the need to protect unpopular demonstrators wherever practicable and to ensure that action taken against an association is well-founded;
r. the need to ensure that appropriate compensation is paid for the use, damage and destruction of property and that any property which is occupied in the public interest is restored to its owner as soon as possible;
s. the need to ensure that any disruption of education and the holding of elections is minimised; and
t. the need to ensure that undue restrictions on freedom of movement are not imposed and to prevent the collective expulsion of aliens by design or effect.

## III. RESPONSIBILITY IN CONFLICT ZONES

### A. Introduction

Given the continued relevance of Convention provisions to the sorts of situation prevailing in conflict zones, the issue of responsibility for possible non-compliance with them inevitably arises. The determination of where that responsibility lies is not entirely straightforward because of the different possible locations of the conflict zones, as well as the different actors that might be involved in events there.

Thus, when considering the need to fulfil the requirements of the Convention, there is the possibility of being concerned with conduct in two different sets of territories, namely, those that form part of one or more of its High Contracting Parties and those that do not form part of any High Contracting Party. Furthermore the conduct giving rise to concern about compliance with the requirements of the Convention could in the case of the former comprise (a) the acts and omissions of non-state actors; (b) the acts and omissions of the High Contracting Party on whose territory they are occurring ("the territorial High Contracting Party"); (c) the acts and omissions of another High Contracting Party (the non-territorial High Contracting Party"); (d) the acts and omissions of a state that is not a High Contracting Party; (e) the acts and omissions of an international organisation acting through a High Contracting Party; (f) the acts and omissions of an international organisation acting through a state that is not a High Contracting Party[187].

In the case of conflict zones on the territory of a state that is not a High Contracting Party, the conduct giving rise to concern about compliance with the requirements of the Convention could comprise all the acts and omissions previously listed except, for obvious reasons, those of a territorial High Contracting Party.

In seeking to clarify the actual scope of responsibility under the Convention in conflict zones, the basic

[187] Categories (c)-(f) specify only one state in each instance but in many conflicts they could involve several.

principles governing responsibility that have been identified by the Court are first reviewed. Then consideration is given to their application to the different situations just outlined, whether as dealt with in the existing case law of the Court - although it has not been entirely consistent in its approach - or as they can be expected to deal with in the case of those that it has not yet had occasion to address. No responsibility can arise under the Convention for a state that is not a High Contracting Party[188], whether acting on its own behalf or of that of an international organisation. The position of such a state is only examined below insofar as its acts or omissions have any bearing on the responsibility of High Contracting Parties.

**B. Basic principles of responsibility**

In all cases the fundamental question to be answered will be whether the conduct in question - regardless of whether it is extra- or intra-territorial - is not only attributable to a High Contracting Party but should also be can be regarded as coming within the jurisdiction of that High Contracting Party for the purpose of Article 1 of the Convention since that is the only basis on which responsibility for such a High Contracting Party can arise. A negative answer would not, of course, preclude the possibility of responsibility arising under some other international obligation[189].

Location is especially important in determining responsibility under the Convention as the starting assumption in its application has been that the jurisdiction of a High Contracting Party for the purpose of Article 1 - the basis of the obligation to secure Convention rights and freedoms - exists primarily or essentially in respect of matters occurring within its territory[190]

Notwithstanding the emphasis placed by the Court on the regional character of the Convention, jurisdiction can sometimes also be established as existing in respect of matters occurring outside a High Contracting Party's territory - and indeed outside Europe - but this has not been readily accepted in all circumstances, notwithstanding an evident link between an interference with Convention rights and freedoms and the conduct of a High Contracting Party.

Thus jurisdiction will be assumed to be exercised on account of certain non-territorial factors, such as: acts of public authority performed abroad by diplomatic and consular representatives of the state; the criminal activities of individuals overseas against the interests of the state or its nationals; acts performed on board vessels flying the state flag or on aircraft or spacecraft registered there; and particularly serious international crimes (universal jurisdiction).

Moreover it has been recognised that, in addition to the state territory proper, territorial jurisdiction will extends to any area which, at the time of the alleged violation, is under the "overall control" of the High Contracting Party concerned, notably occupied territories[191], to the exclusion of areas outside such control[192]. Furthermore it has been accepted that effective control over individuals outside a High Contracting Party's territory may also be sufficient to establish jurisdiction for the purposes of the Convention[193].

Where a High Contracting Party acts on behalf of an international organisation, its conduct may thereby be attributable to that organisation and thus, as a matter of principle, will cease to be a matter of responsibility under the Convention. However, the location and context of that conduct may be relevant to the conclusion that the High Contracting Party has still retained some responsibility under the Convention[194].

**C. Application of the principles of responsibility in conflict zones**

It is perhaps most convenient to consider the issue of responsibility by reference to the different potential actors involved, although there will inevitably be some overlap in the analysis of their respective positions because in at least some conflict zones they will not operate in isolation from one another.

*1. Non-state actors*

Non-state actors - whether individuals, rebels, insurgents, belligerents or armed opposition groups — cannot themselves be responsible under the Convention system as responsibility is restricted to High Contracting Parties, although their conduct could give rise to other forms of international responsibility[195]. However, it would be possible for their conduct to

[188] Appl 262/57, *x v Czechoslovakia*, I *Yb* 170 (1955-1957).

[189] Such as the International Covenant on Civil and Political Rights.

[190] *Banković and Others v Belgium and Others* (dec.), 52207/99, 12 December 2001 [GC].
*Gentilhomme and Others v. France*, 48205/99;48207/99;48209/99, 14 May 2002

[191] *Loizidou v. Turkey (preliminary objections)*, 15318/89, 23 March 1995 [GC]

[192] *Banković and Others v Belgium and Others* (dec.), 52207/99, 12 December 2001 [GC].

[193] Öcalan *v. Turkey*, 46221/99, 12 May 2005 [GC].

[194] See C4 below.

[195] Whether under international humanitarian law or international criminal law.

be attributed to a High Contracting Party and to have occurred within its jurisdiction where it took place within its territory and the High Contracting Party can be regarded as having effectively authorised this or acquiesced in its occurrence in those situations where the High Contracting Party was in a position to prevent it from happening[196]. This, as will be seen below, is unlikely where the conduct occurs in a part of the territory - whether some or all of the conflict zone — over which the High Contracting Party does not exercise control.

It remains to be seen whether there would be found to be an exercise of jurisdiction for Convention purposes if it could be established that a High Contracting Party - without any physical presence on its part - was directing or supporting the activities of rebels, insurgents, belligerents or armed opposition groups[197] in the territory of another High Contracting Party which interfered with the enjoyment of Convention rights and freedoms there[198]. Such a finding would certainly seem appropriate where this concerned such activities on the territory of another High Contracting Party, notwithstanding the lack of a physical presence of the directing or supporting High Contracting Party, as this would otherwise result in the vacuum of rights protection that the Court rightly abhors. The Court has indicated its support for a finding of jurisdiction in such a case not only by including within jurisdiction the acts of a foreign state supporting the installation of a separatist state within the territory of the state concerned - albeit in a case where the High Contracting Party concerned had troops on the territory of another High Contracting Party in which separatists were in control - but also by being prepared to treat as acquiescence or connivance in the acts of private parties the recognition by the state in question of the acts of self-proclaimed authorities which are not recognised by the international community[199].

The regional focus that has been taken with regard to jurisdiction might, however, make the Court more reluctant to find that responsibility under the Convention is engaged where a High Contracting Party is providing direction or support for activities on the territory of a state that is not itself a High Contracting Party[200].

[196] See *A v United Kingdom*, 25599/94, 23 September 1998, *Paul and Audrey Edwards v United Kingdom*, 46477/99, 14 March 2002 and *Öneryildiz v Turkey*, 48939/99, 30 November 2004 [GC].

[197] Hereafter referred to collectively as "armed opposition groups".

[198] This was not established with respect to the United States in the *Case Concerning Certain Military and Paramilitary Activities in and against Nicaragua*, judgment of the International Court of Justice, 27 June 1986.

[199] *Ilascu and Others v Moldova and Russia*, 48787/99, 8 July 2004 [GC].

[200] This would not, of course, preclude the possibility of responsibility arising under a global human rights instrument or international law generally.

*2. The Territorial High Contracting Party*

In principle a High Contracting Party will be exercising its jurisdiction whenever it takes any measures, or indeed fails to act where the Convention requires it to do so, in any part of its territory and this would include its response to any form of armed uprising by persons within or any invasion or other incursion from without. Of course, in judging its responsibility the Court would need to take account of the limitations that can be imposed on rights and freedoms, including those that might rely on a derogation under Article 15.

However, where the conflict leads to the territorial High Contracting Party losing control over part of its territory to a local authority sustained by rebel forces or by another state, it is not thereby absolved of responsibility under the Convention. In such circumstances the High Contracting Party concerned will retain its positive obligations towards persons within its territory[201].

It must, therefore, endeavour, with all the legal and diplomatic means available to it *vis-à-vis* foreign states and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention.

Such measures must actually be appropriate and sufficient in the instant case. They will include measures needed to re-establish its control over territory in question, as an expression of its jurisdiction, and measures to ensure respect for the rights and freedoms of individuals in that territory.

The obligation to re-establish control would require the High Contracting Party to refrain from supporting the separatist regime and to act by taking all the political, judicial and other measures at its disposal - negotiations with occupying power and use of international organisations - to re-establish its control over that territory. However, in a given case the options may be limited where the separatist regime is in a stronger military position and due account can be taken of reprisals for particular measures.

Nonetheless the illegality of what has occurred should be recognised and rehearsed through the institution of relevant criminal proceedings. At the same time diplomatic efforts should be undertaken and this could include talks with the separatists. Moreover cooperation in practical matters such as air traffic control, telephone links and sport will not necessarily be viewed as acquiescence in separation but, in a given context could be a manifestation of a desire to re-establish control.

[201] *Ilascu and Others v Moldova and Russia*, 48787/99, 8 July 2004 [GC].

In the case of individuals whose rights and freedoms have been affected, appropriate measures might be the quashing or nullification of adverse rulings and court judgments in the separatist territory, the institution of criminal proceedings against those interfering with the rights and freedoms concerned, the provision of medical assistance and financial support for family members, as well as efforts to maintain For those who are deprived of liberty, negotiations to secure their release, whether directly with the separatists or through intermediaries might be needed. In all instances clear evidence of real diligence in taking the measures will be required.

It is likely that the territorial High Contracting Party would have a responsibility to ensure that judgments reached in violation of Article 6 were not enforced, whether during the conflict or subsequently, as otherwise a violation of this provision would become attributable to it. This is a more exacting requirement than in respect of third states[202] but that can be distinguished from the flagrant denial of justice test applicable to them because this concerns a matter occurring in the legal space to which the Convention applies. However, a violation of Article 6 should not be regarded as occurring simply because the courts rendering the judgments concerned are deemed illegal; such courts should still be regarded as established by law if they nonetheless satisfy the requirements of independence and impartiality[203].

Further consideration needs to be given to the way in which appropriate measures are defined since it did not appear to have been practical for Moldova to secure the release of persons in Transdniestria despite the conclusion of the Court that its failure in this regard was a violation of the Convention [204] and this ultimately occurred without its involvement.

Insofar as the loss of control by a territorial High Contracting Party over part of its territory is to a state that is also a High Contracting Party, there should be no significant effect on the total protection to be enjoyed under the Convention as the latter state will become primarily responsible for the implementation of its rights and freedoms[205]. However, if the state achieving effective control of the territory concerned is not a High Contracting Party, the protection afforded by the Convention will be substantially reduced as a result of the fact that it cannot be held responsible under the Convention and of the limited nature of the responsibility still continuing for the territorial High Contracting Party.

It might also be thought strange to limit the responsibility of the territorial High Contracting Party to the fulfilment of positive obligations in circumstances where there is only a separatist regime and no intervention by another High Contracting Party - notwithstanding the treatment of these as comparable situations - since this would result in a situation where there was no High Contracting Party with responsibility for securing the Convention rights and freedoms in full but this seems to be the implication of the case law just considered[206].

However, such a situation has been distinguished by the Court from one where there is only a failure by local authorities to observe directions from the central government - albeit without any substantial resort to force - the fact that an interference with Convention rights and freedoms is imputable to those authorities will not alter the full responsibility under the Convention of the High Contracting Party itself[207]. In the Court's view mere difficulties encountered by a High Contracting Party in securing compliance with the rights guaranteed by the Convention in all parts of its territory should not be regarded as affording an excuse since the higher authorities of the state are under a duty to require their subordinates to comply with the Convention and cannot therefore shelter behind their inability to ensure that it is respected[208].

It was undoubtedly significant in finding the High Contracting Party for the unlawful detention of the applicant concerned that the local authorities concerned were public law institutions performing functions assigned to them by the constitution and the law and so could not be described as a non-governmental organisation or group of individuals with a common interest, for the purpose making an application under Article 34 of the Convention. This attaches some importance to the way in which the High Contracting Party chooses to characterise an entity seizing control over part of its territory but the dividing line between a constitutional crisis and out and out conflict may not always be clear cut. It was also significant for

[202] *Drozd and Janousek v. France and Spain*, 12747/87, 26 June 1992.

[203] See *Cyprus v Turkey*, 25781/94, 10 May 2001 [GC].

[204] *Ilascu and Others v Moldova and Russia*, 48787/99, 8 July 2004 [GC].

[205] See further the following sub-section.

[206] It was also not considered in *Assanidze v Georgia*, 71503/01, 8 April 2004 [GC].

[207] *Assanidze v Georgia*, 71503/01, 8 April 2004 [GC].

[208] The appropriateness of this conclusion in the instant case might be seen as supported by the prompt release of the applicant after the judgment was handed down: see Resolution ResDH(2006)53 concerning the judgment of the European Court of Human Rights of 8 April 20042004 — Grand Chamber in the case of *Assanidze* against Georgia *(Adopted by the Committee of Ministers on 2 November 2006, at the 976th meeting of the Ministers' Deputies).*

the Court that the local authorities concerned had no separatist aspirations.

An attempt to preclude any responsibility arising under the Convention where the loss of control exists at the time of ratification would not be possible as territorial exclusions are precluded except for the circumstances provided for in Article 56(1) as regards non-metropolitan territories[209].

It remains to be seen whether the loss of control by a High Contracting Party could be such as to lead to the territory in question being acquired by the High Contracting Party in occupation. In principle it seems improbable as the acquisition of territory through illegal acts ought not to be possible.

*3. The Non-territorial High Contracting Party*

Where, as a consequence of military action - whether lawful or unlawful - a state exercises effective control over the territory of another High Contracting Party, that state will be regarded as having jurisdiction for the purpose of Article 1 and thus be obliged to secure in that area the rights and freedoms set out in the Convention [210].

It does not matter that the fact of control is the result of the direct action of its armed forces or is through a subordinate local administration. There will be no need to establish that the non-territorial High Contracting Party exercising effective control actually exercises detailed control over the policies and actions of the administration acting as the day-to day authority of the territory in question[211].

Responsibility will thus arise not only for the conduct of its own forces but that of the local administration that survives because of support from the military and the state more generally[212].

This has led to findings of violations of Protocol No. 1, Article 1 where owners have been denied access to their property in occupied territory as a result of the actions of a subordinate local administration[213] and where a person has been refused a permit to leave the occupied territory to participate in various bicommunal meetings in another part of the territorial HCP contrary to the right to freedom of assembly[214]. Furthermore in the one inter-state case where effective control was found to be exercised by the respondent High Contracting Party, the latter was held to have violated an extensive range of Convention Rights and Freedoms[215].

In the Court's view the responsibility of the non-territorial High Contracting Party exercising effective control extends to both negative and positive obligations so as to prevent "a regrettable vacuum in the system of human-rights protection"[216] but there must be some limits on the extent of positive obligations in view of the conclusion of the Court that such obligations under the Convention may still be continuing for the territorial High Contracting Party[217].

The existence of effective control is a matter of fact in each case. It could relate to a very limited area but would probably require a substantial contingent of troops[218] covering the entire area and present there for more than a short period[219]. The existence of constant patrols and check points on all main lines of communication are also likely to be significant considerations favouring a finding that effective control exists.

However, as part of the emphasis placed by the Court on the essentially territorial nature of jurisdiction, effective control will not be regarded as existing merely because the effects said to interfere with Convention rights and freedoms were the direct consequence of an act by a High Contracting Party; there must always be some actual presence by that High Contracting Party on the territory of the state affected[220]. This probably does not mean that there could be no responsibility under the Convention for conduct such as the firing of a missile on to the territory of another state as the Court has been willing to acknowledge that responsibility can arise for the effects of acts by a High Contracting Party's officials that are non-territorial, albeit in the context of judicial rather than military acts[221], but the basis of re-

[209] See *Matthews v United Kingdom,* 24833/94, 18 February 1999 [GC], *Assanidze v Georgia*, 71503/01, 8 April 2004 [GC] and *Ilascu and Others v Moldova and Russia*, 48787/99, 8 July 2004 [GC].

[210] *Loizidou v Turkey*, 15318/89, 18 December 1996 [GC]

[211] *Loizidou v Turkey*, 15318/89, 18 December 1996 [GC], *Cyprus v Turkey*, 25781/94, 10 May 2001 [GC], *Ilascu and Others v Moldova and* Russia, 48787/99, 8 July 2004 [GC] and *Issa and Others v Turkey*, 31821/96, 16 November 2004.

[212] *Cyprus v Turkey*, 25781/94, 10 May 2001 [GC].

[213] *Loizidou v Turkey*, 15318/89, 18 December 1996 [GC], *Cyprus v Turkey*, 25781/94,, 10 May 2001 [GC] and *Eugenia Michaelidou Developments Ltd and Michael Tymvios v. Turkey*, 16163/90, 31 July 2003

[214] *Djavit An v. Turkey*, 20652/92, 20 February 2003

[215] *Cyprus v Turkey*, 25781/94, 10 May 2001 [GC]; in which the Court found Turkey to be responsible for violations of Articles 2, 4, 5, 8, 9, 10 and 13, in addition to the violation of Article 1 of Protocol No. 1.

[216] *Cyprus v Turkey*, 25781/94, 10 May 2001 [GC], at para 78

[217] As in *Ilascu and Others v Moldova and Russia*, 48787/99, 8 July 2004 [GC].

[218] See *Issa and Others v Turkey*, 31821/96, 16 November 2004.in which the Court emphasised armed forces of more than 30,000 in northern Cyprus in the *Loizidou v.Turkey* and *Cyprus v. Turkey* cases

[219] This was the basis for distinguishing the previous two cases from the situation in *Issa and Others v Turkey*, 31821/96, 16 November 2004.

[220] *Banković and Others v Belgium and Others* (dec.), 52207/99, 12 December 2001 [GC].

[221] See *Drozd and Janousek v. France and Spain*, 12747/87, 26 June 1992. The view expressed in this case was endorsed by the Court in *Drozd and Janousek v. France and Spain*, 12747/87, 26 June 1992.

sponsibility in such instance is one of consequence rather than control.

Furthermore the nature of effective control for the purpose of responsibility under the Convention would not seem to embrace limited control of a state's airspace, as occurred in the bombing of the Former Yugoslavia which gave rise to the *Banković* case[222]. Nevertheless it is perhaps significant that the control over airspace in that instance was never more than "limited" and amore substantial blockade, whether by air or by sea, might be sufficient to establish a situation of effective control.

Although all the cases in which effective control has been found to exist were ones where such control was being exercised over the territory of another High Contracting Party, a Chamber of the Court has indicated that it does not exclude the possibility that, as a consequence of military action, a High Contracting Party could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of a state that is not a High Contracting Party. This would mean that, if there was a sufficient factual basis for holding that, at the relevant time, alleged victims of violations of Convention rights were within that specific area, it would follow logically that they were within the jurisdiction of the High Contracting Party and not of the other state, notwithstanding that the latter would clearly not fall within the legal space (*espace juridique*) of the Contracting States[223]. It remains to be seen whether the finding of effective control in such a situation would involve a more exacting view of what constitutes such control on account of the principal reason for admitting this exception to the territorial basis for jurisdiction being the wish to avoid any "vacuum in the system of human rights protection"[224] or whether the Grand Chamber's essentially regional focus will lead it to reject the possibility of there being any responsibility under Convention outside the territory of High Contracting Parties whatever the degree of control being exercised[225].

The responsibility of a non-territorial High Contracting Party exercising effective control over the territory of a High Contracting Party would also be engaged where its authorities acquiesced or connived in the acts of private individuals which violate the Convention rights of other individuals living in the occupied territory and thus within its jurisdiction[226]. Conversely, where there are remedies in the occupied territory that could be used against private parties interfering with Convention, these would first need to be exhausted before redress can be sought under the Convention system[227].

In the absence of effective control, the provision of judges or other officials for the authorities of a territory would not entail an exercise of jurisdiction *ratione personae* as the judges or administrators when taking action (or failing to act) in a manner contrary to Convention rights and freedoms would not be acting as judges or administrators of the non-territorial High Contracting Party[228]. In some circumstances, however, such support could be viewed as a form of acquiescence or connivance in the violation of Convention rights and freedoms by non-State actors.

The loss of effective control will not affect the responsibility of the territorial High Contracting Party where this loss is attributable to it. An attempt to suggest the contrary was made, albeit not in a conflict situation, in the United Kingdom's defence to an alleged violation of the right to take part in the choice of the legislature when Gibraltar was not included in the definition of the United Kingdom for the purpose of elections to the European Parliament, notwithstanding the application of Community law to it. This omission interfered with the right of the applicant - a resident of Gibraltar - to free elections under Article 3 of Protocol No. 1.

The Court placed emphasis on the choice made by the United Kingdom in bringing about this situation; its responsibility derived from its having entered into treaty commitments subsequent to the applicability of Article 3 of Protocol No. 1 to Gibraltar, namely the Maastricht Treaty taken together with its obligations under the Council Decision and the 1976 Act. Further, the Court notes that on acceding to the EC Treaty, the United Kingdom chose, by virtue of Article 227(4) of the Treaty, to have substantial areas of EC legislation applied to Gibraltar[229]. As a consequence the United Kingdom was considered to be responsible under Article 1 of the Convention for securing the rights

[222] *Banković and Others v Belgium and Others* (dec.), 52207/99, 12 December 2001 [GC].

[223] *Issa and Others v Turkey*, 31821/96, 16 November 2004. However, the evidence of such control was not found to have been established.

[224] Something emphasised in *Cyprus v Turkey*, 25781/94, 10 May 2001 [GC] and reaffirmed in *Banković and Others v Belgium and Others* (dec.), 52207/99, 12 December 2001 [GC].

[225] For this reason a majority in the House of Lords in *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26 saw *Banković* rather than *Issa* as the approach of the Court to be preferred.

[226] This was not found to have been established in *Cyprus v Turkey*, 25781/94, 10 May 2001 [GC]

[227] The Court did not consider the local authorities to be totally passive with regard to acts of private parties that were the subject of complaints in *Cyprus v Turkey*, 25781/94, 10 May 2001 [GC].

[228] *Drozd and Janousek v. France and Spain*, 12747/87, 26 June 1992..

[229] *Matthews v United Kingdom*, 24833/94, 18 February 1999.

guaranteed by Article 3 of Protocol No. 1 in Gibraltar regardless of whether the elections were purely domestic or Europe

This conclusion could have implications for the responsibility of a territorial High Contracting Party that agrees to allow another state to take over on its behalf operations against an armed opposition group or to take control of a particular area as part of a peacekeeping operation. If the state were a High Contracting Party, case law might lead to the conclusion that it rather than the territorial High Contracting Party should have responsibility under the Convention but if the state were not a High Contracting Party concern to avoid a vacuum in the protection of Convention rights and freedoms might result in responsibility being laid at the door of the territorial High Contracting Party.

The involvement of a non-territorial High Contracting Party through help to separatists to set up a separatist regime and participation of its military personnel in the fighting for this purpose should also be sufficient to establish jurisdiction, without the need to show that the non-territorial High Contracting Party has effective control, at least where the territorial High Contracting Party has lost control of the territory concerned[230]. Furthermore after a ceasefire the continued provision of military, political and economic support to the separatist regime, thus enabling it to survive by strengthening itself and by acquiring a certain amount of autonomy will also be sufficient to establish jurisdiction. In addition collaboration by the authorities of the non-territorial High Contracting Party with an illegal regime, such as handing over persons to it, will be capable of engaging its responsibility for the acts of that regime.

Moreover it would seem that a non-territorial High Contracting Party can still have some responsibility under the Convention for its activities on the territory of another High Contracting Party even though it has less than effective control over a part of that territory. Certainly the former European Commission of Human Rights was willing to treat a state as responsible for covert operations carried out abroad (but in another High Contracting Party) by its authorised agents[231]. This can be seen as an instance of actual authority so the duty is only to respect the rights of individuals to the extent that it exercises authority over such persons.

However, subsequent case law has established that responsibility for the acts of a High Contracting Party's agents can arise under the Convention even where these take place in a state that is not a High Contracting Party and so the imperative to avoid a vacuum is not applicable. Such responsibility was thus found to be possible both in the case of an arrest of terrorist suspect[232] and in a military operation in which a number of persons were allegedly arrested and killed[233]. The crucial consideration for the Court was that the persons affected were themselves actually or allegedly under the effective control of the agents of a High Contracting Party[234].

Accountability in such situations is considered to stem from the fact that Article 1 of the Convention cannot be interpreted so as to allow a state party to perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own territory[235], although this reasoning might be thought equally applicable to the approach to effective control over territory which nonetheless has been seen to be a matter of dispute.

Although extraterritorial acts of a High Contracting Party may not in themselves engage its responsibility under the Convention, the determination of any civil action brought by those affected within its own courts must still comply with the rights protected by Article 6. However, the absence of a substantive right of action under domestic law in respect of the extra-territorial acts will not be regarded as having the same effect as an immunity, in the sense of not enabling the applicant to sue for a given category of harm and thus entailing a denial of the right of access

[230] This would seem to be the implication of the rulings in *Assanidze v Georgia*, 71503/01, 8 April 2004 and *Ilascu and Others v Moldova and Russia*, 48787/99, 8 July 2004 [GC].

[231] *Stocké v. Germany*, 11755/85, 19 March 1991, opinion of the Commission, p. 24, § 167

[232] *Öcalan v. Turkey*, 46221/99, 12 March 2003 and 12 May 2005 [GC].

[233] *Issa and Others v Turkey*, 31821/96, 16 November 2004. Such control was not established in this case. See the reliance in this case on Appl 17392/90, *M. v Denmark,*73 DR 193 (1992); Appl 28780/95, *Illich Sanchez Ramirez v France*, 86 DR 155 (1996); *Coard et al. v the United States*, the Inter-American Commission of Human Rights decision of 29 September 1999, Report No. 109/99, case No. 10.951, §§ 37, 39, 41 and 43; and the views adopted by the Human Rights Committee on 29 July 1981 in the cases of *Lopez Burgos v Uruguay* and *Celiberti de Casariego v. Uruguay*, nos. 52/1979 and 56/1979, at §§ 12.3 and 10.3 respectively.

[234] Thus in the Chamber ruling in *Öcalan v Turkey* (12 March 2003) the Court stated that The Court considers that "the circumstances of the present case are distinguishable from those in the aforementioned *Banković and Others* case, notably in that the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey and in the Grand Chamber ruling it stated: "It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the "jurisdiction" of that state for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. It is true that the applicant was physically forced to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey (see, in this respect, the aforementioned decisions in *Sánchez Ramirez* and *Freda, and, by converse implication, Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII)".

[235] para 72.

to court[236]. Furthermore it would be impermissible under the Convention for a High Contracting Party to allow the use by its courts or authorities of evidence obtained in circumstances contrary to the prohibition on torture and inhuman and degrading treatment, notwithstanding that such torture or ill-treatment occurred outside its jurisdiction for Convention purposes[237].

4. *International Organisations*

Where an interference with Convention rights and *freedoms* is carried out by a High Contracting Party pursuant to its commitments as a member of an international organisation, the location of the interference and the nature of this obligation are the considerations that will determine whether any responsibility under the Convention can arise.

Thus, where the action or inaction does not occur on the territory of any High Contracting Party and the High Contracting Party immediately implicated in the interference is acting pursuant to a Security Council resolution adopted under Chapter 7 of the United Nations Charter in order to deal with a threat to international peace and security, the Court has taken the view that the impugned action or inaction should be attributed to the United Nations and thus it has no competence *ratione personae*[238].

It remains to be clarified as to the extent to which the issues of location and obligation are equally significant. There is no doubt that the nature of the United Nations — an "organisation of universal jurisdiction fulfilling its collective secure objectives"[239] — was of particular importance in the only instance that the Court has so far been concerned with obligations directly imposed by that body. This character was also reinforced in the Court's view by the fact that acceptance of the Charter by High Contracting Parties generally preceded ratification of the Convention and that under Article 103 of the Charter precedence was to be attached to United Nations obligations over those arising from any other international agreement[240]. It may well be that a regional organisation — at least not one acting pursuant to the United Nations Charter — might not be accorded the same respect, particularly if it came into being after the Convention's entry into force.

However, it was also significant that the action was being carried out in the territory of a state that was not at the time a High Contracting Party. This allowed the Court to distinguish the situation in this case from its more general reluctance to eliminate all responsibility under the Convention for acts in fulfilment of international obligations where these take place on the territory of a High Contracting Party. Certainly in a situation where an obligation was being implanted on a High Contracting Party's territory the Court had previously found that there would still be responsibility for interferences with Convention rights and freedoms where the organisation imposing the obligation did not provide comparable protection to that afforded by the Convention, which was a matter to be determined by the Court.[241]. Moreover, although it reached this conclusion where the impugned action involved the implementation by a High Contracting Party of an international obligation on its own territory, the concern already noted about creating a vacuum in the application of the Convention means that it is improbable that the fulfilment of such an obligation on the territory of another High Contracting Party would be viewed any differently.

The Court has left open the question of whether the issue of location is of equal or lesser significance than the nature of the obligation when it comes to excluding responsibility under the Convention. However, given the emphasis attached by the Court in its ruling to the precedence of obligations under the United Nations Charter over all others, it ought not to be important that that the implementation of such obligations in a manner that interferes with Convention rights and freedoms is occurring on the territory of a High Contracting Party. Such a conclusion is nonetheless a matter for concern as the Charter system conspicuously lacks effective arrangements to protect human rights where the United Nations requires its members to takes any action.

**D. Conclusion**

The existence of a conflict zone on the territory of a High Contracting Party will not thereby lead to it losing all responsibility for implementation there of the Convention. However, there are circumstances where its loss of control in such a zone will result in a substantial diminution of that responsibility. Where the loss of control is to another High Contracting Party, there should be no vacuum in the protection that the Con-

[236] *Markovic and Others v Italy*, 1398/03, 14 December 2006 [GC].

[237] *A v Secretary of State for the Home Department,* [2005] UKHL 71, 8 December 2005.

[238] *Behrami and Behrami v France* (dec.), 71412/01, 2 May 2007 [GC]

[239] *Ibid*, para 51.

[240] *Ibid*, para 147. This was also considered crucial in the similar ruling of the English Court of Appeal in *R (Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327.

[241] *Bosphorus Hava Yollan Turizm ve Ticaret Anonim Şirketi v Ireland*, 45036/98, 30 June 2005 [GC].

vention is supposed to afford as the responsibility for implementation will be shared by the two states but that protection will be very limited where the loss of control is to a state that is not a High Contracting Party or, possibly, where the loss of control is to a separatist regime acting without the assistance of another state. Furthermore the protection of the Convention seems likely to be displaced entirely in the case of action taken pursuant to obligations arising from membership of the United Nations, albeit that there is still some uncertainty as to what the consequence of such action being taken by a High Contracting Party on its own territory or that of another High Contracting Party.

Where the conflict zone is not on the territory of a High Contracting Party the protection afforded by the Convention is likely to be more limited still but its application cannot be entirely discounted.

## IV. CONCLUSION

It is clear that Convention rights and freedoms remain entirely relevant to situations in conflict zones, notwithstanding that the Court has so far had only limited occasion to consider its specific application in such situations. However, the possibility that a failure to implement Convention rights and freedoms in the appropriate, if limited, manner required in situations in conflict zones will necessarily engage the responsibility of one or more High Contracting Parties is by no means certain.

Such responsibility is most likely to arise where the conflict zone is on the territory of a High Contracting Party and its existence is least probable, but by no means impossible, where the conflict zone is elsewhere. However, even where the conflict zone is on the territory of a High Contracting Party, the enforcement of responsibility may well be complicated by its division between High Contracting Parties and, possibly, by the insistence of the Court on a High Contracting Party having positive obligations which it will be in no position to fulfil.

Perhaps an even greater concern about the application of the Convention in conflict zones is the possibility that measures to secure international peace and security pursuant to a resolution of the United Nations Security Council may entirely displace the requirement to observe the rights and freedoms in it, notwithstanding that respect for those rights and freedoms ought to be both the ultimate goal of securing such peace and security and an indispensable requirement for its true achievement.